U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2007

CASE NO.: 2005-LHC-1207

OWCP NO.: 07-160584

IN THE MATTER OF:

T. M.[1]

Claimant

v.

CENEX HARVEST STATES COOPERATIVES

Employer

and

LIBERTY MUTUAL INSURANCE CO.

Carrier

APPEARANCES:

ZARA ZERINGUE, ESQ.
For The Claimant

SCOTT B. KEIFER, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

(herein the Act), brought by Claimant against Cenex Harvest States Cooperatives (Employer) and Liberty Mutual Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on August 3, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 19 exhibits, Employer/Carrier proffered 43 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant alleges an injury on June 25, 2001.

2. That there existed an employee-employer relationship at the time of the alleged accident/injury.

3. That Employer was notified of the alleged accident/injury by July 2 or 3, 2001. (Tr. 74)

4. That Employer/Carrier filed Notices of Controversion on November 13, 2001 and January 14, 2002.

5. That informal conferences before the District Director were held on April 17, 2002 and April 1, 2004.

6. That Claimant's average weekly wage at the time of alleged injury was $402.99.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from July 2, 2001 through October 22, 2001, for 16.143 weeks, at a compensation rate of $270.00, for a total of $4,358.56.

8. That certain medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability, if any.

3. Whether Claimant has reached maximum medical improvement.

4. Whether Claimant requires further medical treatment from his alleged June 25, 2001 injury.

5. Whether Claimant was capable of returning to his former employment at the time of his first release by Dr. Watermeier as of November 2001 or without restrictions at the time of his second release by Dr. Watermeier on May 16, 2002.

6. Whether Dr. Watermeier signed the November 2001 letter from Carrier.

7. Whether a superseding/intervening cause relieved Employer/Carrier of liability.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he was injured on June 25, 2001, when he fell at work, hitting the deck of a ship. He was sore when he got off the deck. He continued to work loading the ship. His duties did not require any heavy lifting or moving. He did not feel aches

and pains. He stated he eventually began to have more and more "hurting" and needed to see a doctor. (Tr. 90, 94). He did not fill out a report of the incident on the same day. He completed a handwritten report of the accident later. (Tr. 93).

Claimant was seen by Dr. Desse, his family doctor, who gave him an "unfit for duty" slip. (Tr. 90-91). Dr. Desse told Claimant he had a "little bruise" and was sent to get x-rays. (Tr. 92). Claimant stated he complained to Dr. Desse about his lower back being sore. (Tr. 93). He has seen Dr. Desse after the initial visit and has not returned to work for Employer. (Tr. 94).

Claimant acknowledged that he previously injured his back and shoulder in 1996 while cranking a lifeboat motor. (Tr. 95). He was out of employment for about a year. He did not have any back surgery as a result of his 1996 accident, however, Dr. George Murphy performed shoulder surgery after the injury. (Tr. 96).

On February 28, 2001, Claimant stated he injured his back again when he had an altercation with a state trooper who hit him in the chest causing him to fall backwards against a car. He also testified that the trooper grabbed him, picked him up and slammed him to the ground, dislocating both of his arms and shoulders. He treated with Dr. Bouchette, his family doctor, for back pain for about three weeks after which he returned to work for Employer. He described his back pain as moderate during the three-week treatment period. (Tr. 98).

Claimant testified he also sought treatment from Dr. Watermeier to whom he complained about his "lower back." He was not released to return to work. (Tr. 100). He continued to see Dr. Watermeier until Hurricane Katrina in August 2005. Dr. Watermeier retired afterwards and he began seeing Dr. Manale of the same clinic. (Tr. 101). He made the same complaints to Dr. Manale about his lower back with sharp pains down his legs. (Tr. 102). He sees Dr. Manale every three months. (Tr. 105).

Claimant was also examined by Dr. Gallagher at the request of Employer for a second opinion. (Tr. 105, 107). He presented with complaints about his lower back and pains in his legs. (Tr. 106).

Claimant was also examined by Dr. George Murphy, at the request of the Department of Labor, who ordered a MRI. (Tr. 108-109).

Claimant received prescriptions for medications from his doctors for which he personally paid. (Tr. 110). He testified that he cannot function like he used to because of his work injury. He stated he has severe pain constantly. (Tr. 111). Claimant

testified that he was “not crippled” and was “not no handicap,” but it hurts to move around, or lay down too long, or sit too long. He is able to cut the grass with a weed eater which takes hours to complete with rest breaks. (Tr. 112).

Claimant testified that he “snaps at people” and does not trust people anymore because he has “been railroad (sic) through [Employer].” (Tr. 113). He has not applied for any jobs since his work injury in 2001. (Tr. 114). He stated he “was hurting.” (Tr. 115).

Claimant testified that a private investigator attempted to serve “papers” on him at a store for his fiancée by hitting him on the arm. (Tr. 117).

On cross-examination, Claimant affirmed that he is a high school graduate. He is currently receiving Social Security Disability benefits. (Tr. 139-140). He acknowledged that he filed lawsuits as a result of his 1996 back injury and the altercation with the state trooper. (Tr. 140-142).

He affirmed that when he returned to work for Employer after his altercation with the state trooper, his back was not bothering him at all. He initially testified that he could not state that his pain went away completely, but confirmed that his deposition testimony to the contrary was correct. (Tr. 143-144). He stated he did not remember telling Dr. Bouchette on April 5, 2001, that he had no improvement in his back pain. (Tr. 145-146).

Claimant further acknowledged in deposition that he only had two accidents/injuries before his work injury of June 25, 2001, that is, the 1996 injury and the altercation with the state trooper. (Tr. 147). He denied an incident in which he was beaten up by police on April 26, 1996, and treated at Meadowcrest Hospital. (Tr. 147-148). He recalled a more recent incident on June 7, 2006, when police beat him about the head. (Tr. 149).

Claimant testified that he had another accident after his June 25, 2001 work injury while working at Employer where his left leg gave out for which he received treatment at Meadowcrest Hospital. (Tr. 150, 151). Claimant stated he also twisted his back from his leg giving out. (Tr. 151).

He confirmed that in February 2005, he stepped in a hole and fractured his ankle. He deposed that his psychological problems did not have anything to do with his work injury with Employer. (Tr. 152).

Claimant testified that he worked four or five days after his June 25, 2001 work injury. He did not report the accident because his supervisor was holding the ladder from which he fell. (Tr. 153-154). He did not tell anyone with Employer that he believed he had hurt himself on the date of the work accident. (Tr. 156).

Claimant confirmed that he did not reveal his prior back injuries to Employer. He has not applied for any work or done any work for wages since June 25, 2001. (Tr. 157). He deposed that he has trouble getting in and out of an automobile because of "bending down, getting up, standing up, sitting down, getting up out the car." (Tr. 158).

Statement of Anthony Krummel

On July 2, 2001, Mr. Krummel prepared a handwritten, unsworn statement of the events of June 25, 2001. He stated that when Claimant jumped to the deck of the vessel he hit the deck, his feet slipped and he fell backwards, but caught himself with his arms and hands and his rear end and back never hit the deck. He asked Claimant if he was O.K. to which Claimant responded he was, even though he was slightly embarrassed. He stated Claimant worked the rest of that day, a Monday, and also the following Friday "with no mention of injury." He stated that work was slow and Monday and Friday were the only work days available.

Mr. Krummel further stated that on July 2, 2001, a nurse called trying to verify that Claimant was hurt on the job. He informed the nurse that he was not aware of Claimant being hurt and nothing was ever mentioned by Claimant that he was injured. Without an accident report, Mr. Krummel stated he could not give authority for medical treatment. (EX-42).

Famous Henderson

Mr. Henderson testified that he worked with Claimant on a daily basis at Employer. (Tr. 67). He observed Claimant and Supervisor Krummel pushing a gangway toward a ship on the day of the alleged accident, but did not see Claimant fall. (Tr. 68). He stated he heard "a big boom, and I turned and [Claimant](sic) on the deck of the ship." (Tr. 69).

He continued to work with Claimant loading a ship on the day of the alleged accident. He asked Claimant if he was hurt to which Claimant replied he was "a little hurt." He recalled Claimant may have complained once or twice about his back hurting throughout the week. (Tr. 70).

On cross-examination, Mr. Henderson affirmed his deposition testimony that he asked Claimant if he was going to the doctor to which Claimant "probably said no. Normal thing would be that you are all right after something like that." (Tr. 79). He confirmed he did not have any specific problems with his supervisor, Mr. Krummel. (Tr. 82). Mr. Henderson stated he has been fired and re-hired by Employer four or five times. (Tr. 84).

Rhonda Bonds

Ms. Bonds, a registered nurse, is Senior Operations Auditor Trainer for Crawford & Company. She formerly worked as a medical case manager at which time it was her duty to coordinate medical treatment for Claimant and facilitate his return to work. (Tr. 119-121).

She testified that she created and forwarded a form to Dr. Gallagher which he signed on October 23, 2001, indicating that he was not the Claimant's treating physician, had only seen him for a second opinion and could not find any orthopedic abnormalities that would preclude Claimant from returning to regular duty work. Dr. Gallagher also assigned a maximum medical improvement date of October 23, 2001. (Tr. 122-123; EX-16, p. 5).

Ms. Bonds also stated she forwarded a similar form to Dr. Watermeier for comments on November 21, 2001. The form reflects an "x" in the form which inquires if Claimant is able to work regular duty "at this time," with "Dr. W" annotated next to the entry. A similar entry is made for the inquiry if Claimant had reached maximum medical improvement "at this time." (EX-16, pp. 9-10; Tr. 124). Neither the "x" entries nor "Dr. W" notations are dated. Ms. Bonds did not know when the responses were received from Dr. Watermeier, but acknowledged that Claimant would have been able to return to regular work and had reached maximum medical improvement by such date. She received the form before she closed Claimant's file in February or March 2002. (Tr. 135, 137).

On cross-examination, Ms. Bonds acknowledged she did not provide Dr. Gallagher with a description of Claimant's work duties. (Tr. 126). On August 28, 2001, Dr. Gallagher indicated that he did not have a description of Claimant's work duties. (EX-16, p. 4). On October 22, 2001, Dr. Gallagher noted that Claimant "described his work as medium-type work activity, in my opinion." (EX-16, p. 6; Tr. 132).

John Volz

Mr. Volz is a licensed private investigator who was retained by Employer/Carrier to conduct surveillance on Claimant and perform a criminal and civil background check. (Tr. 163-164). He first videotaped activities of Claimant on February 18 and 20, 2004, which reflected Claimant walking to and from his residence, getting in and out of his car and driving the vehicle. (Tr. 165; EX-31, pp. 6-7; EX-34). Mr. Volz testified that the videos were not altered in any way and represented an accurate depiction of what he witnessed on the two days of surveillance. (Tr. 167).

Mr. Volz also videotaped Claimant on April 2 and 7, 2006, standing in front of his residence talking to three other individuals in an animated fashion, bending over to pick up two newspapers and walking to and getting in and out of a car. (Tr. 168; EX-31, pp. 16-17; EX-34).

Mr. Volz was also asked to serve a subpoena on Claimant's fiancée. He attempted to do so on two occasions, once at Claimant's residence and also upon Claimant at a food store. (Tr. 169-172).

On cross-examination, Mr. Volz acknowledged he performed surveillance on other days in which no videotape of Claimant was made, since Claimant was not observed. (Tr. 173-174, 177). He confirmed that he had contact with Claimant with the subpoena papers while attempting service in the food store. (Tr. 181).

Sheila Benoit

Ms. Benoit was employed with Employer as an administrative assistant for five years. Her duties included assisting the plant manager with new hires, terminations and orientation of employees. She also handled benefits, payroll and disciplinary actions. (Tr. 185-186).

She testified that on July 2, 2001, Claimant telephoned her to inform that he had been involved in a work accident and had been injured. Claimant had been denied medical treatment because workers' compensation knew nothing about his injury. (Tr. 186). She confirmed that Employer's policy required an employee to report any accidents or injuries to their supervisor, the plant manager or to the office. (Tr. 188).

Ms. Benoit confirmed that Claimant worked for Employer after his injury since she prepared the payroll. He worked two full shifts which were scheduled after his accident. She did not know the length of the shifts. (Tr. 189, 202). She was aware that Dr.

Gallagher had released Claimant to return to work in October 2001, as did Dr. Watermeier in late 2001 or early 2002. (Tr. 189). Claimant's position was still available when he was released to return to work. Claimant had not been terminated from employment with Employer. Claimant did not contact Ms. Benoit about returning to work for Employer. (Tr. 190). Ms. Benoit did not personally contact Claimant to advise him that his job was still available. (Tr. 204).

Ms. Benoit was unaware of any problems Claimant was experiencing with his supervisor or co-workers before his June 25, 2001 accident. (Tr. 194). She was also unaware of any written reprimands involving Claimant being insubordinate or arguing with supervisors. (Tr. 195).

Ms. Benoit confirmed that under the Employer's policy a supervisor is required to report any accident or injury. (Tr. 196). She acknowledged that Claimant's supervisor annotated the Accident Report after July 5, 2001, the date of its preparation. (Tr. 198; EX-1, p. 3).

Ms. Benoit affirmed that Employer's safety committee has the responsibility to investigate accidents and to reenact what happened. Such a reenactment of Claimant's accident did not occur. (Tr. 205). The safety committee concluded that Mr. Krummel, Claimant's supervisor, was present at the time of the accident. Ms. Benoit could not explain why Mr. Krummel did not report the accident. (Tr. 206).

The Medical Evidence

Dr. Jean Desse[3]

On July 2, 2001, Claimant presented to Dr. Desse with complaints of back pain. Claimant reported an accident at work on June 25, 2001, in which he fell three to four feet and since has been having back pain. (CX-15, pp. 9-10). On exam, Claimant had marked tenderness on palpation of the lumbar spine and limited range of motion. Dr. Desse prescribed medications. (CX-15, p. 11).

On July 13, 2001, Claimant continued to complain of back pain. A lumbar series of x-rays were ordered and additional medication prescribed. Dr. Desse noted a referral to an orthopedist. (CX-15, p. 8). Claimant was taken off work for an undeterminable period or until he was seen by an orthopedist. (CX-15, p. 7).

[3] Dr. Desse's credentials are not set forth in the record.

Dr. J. O. Trice[4]

On July 17, 2001, Claimant presented to Dr. Trice for evaluation of symptoms arising from his work-related injury of June 25, 2001. Claimant described his fall onto the deck of a ship. (EX-28, p. 14). His dominant symptom was "sharp, aching and throbbing pain in the low back bilaterally," which radiates to his right hip and left leg/thigh. Claimant reported he had not experienced prior symptoms similar to his current symptoms and was symptom free at the time of his work accident. (EX-28, p. 15).

On physical exam, Claimant had moderate restriction in lumbar flexion and left lateral flexion, but exhibited marked restriction on right lateral flexion. (EX-28, p. 16). He had positive straight leg raising on the right. He had "severe pain" in the midline and right iliolumbar group muscles on palpation. Dr. Trice noted marked tenderness and spasm of the paralumbar muscles. Dr. Trice's diagnosis was lumbar sprain/strain. (EX-28, p. 19). He recommended physical therapy and prescribed medications.

Dr. Alix Bouchette[5]

On March 1, 2001, Claimant presented to Dr. Bouchette with complaints of neck, left knee, lower back and shoulder pain after an altercation with a police officer. On exam, Claimant had decreased range of motion of the back due to pain. Dr. Bouchette's assessment was "contusions, abrasions, cervical and lumbar sprain." (EX-23, p. 7). On March 15, 2001, Claimant returned to Dr. Bouchette in follow-up reporting only minimal improvement in his symptoms since his last visit. On exam, Claimant had subjective complaints of pain on movement of the L4-5 area. Dr. Bouchette's assessment was again lumbar sprain. (CX-23, p. 6).

On April 5, 2001, Claimant presented for follow-up for his shoulder, neck, knee and back. He reported improvement in his neck pain, but no improvement of his shoulder, back or knee. Claimant was again assessed with back sprain. He was to return to Dr. Bouchette in one month, however no further follow-up is recorded until 2005. (CX-23, p. 6).

On February 11, 2005, Claimant presented to Dr. Bouchette with a history of right leg fracture on February 7, 2005. He followed-up with Dr. Bouchette on three visits through May 2, 2005. (CX-23, pp. 4-5).

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[4] Dr. Trice's qualifications and credentials are not contained in the record.

[5] Dr. Bouchette's qualifications and credentials are not contained in the record.

Meadowcrest Hospital Records

Claimant has presented to Meadowcrest Hospital with various medical problems to include gastritis in 1994; being "beat up" by police in April 1996 with complaints of low back and left shoulder pain; right hand/wrist pain from falling in May 2002; and right ankle and left shoulder pain in February 2005 secondary to an altercation. (EX-29).

LSU Charity Hospital

Claimant was treated for face and eye pain after an altercation on August 30, 1997. (EX-30, pp. 23-26). Claimant presented at Charity Hospital while in custody following an altercation with police in February 2001 with complaints of pain in his neck, back, both arms and legs. He was aggressive and refused to cooperate with the physical exam. (EX-30, pp. 16-22).

Claimant also received treatment at Charity Hospital in follow-up for his ankle and shoulder problems in February, March, April, May and June 2005. (EX-30).

Dr. John J. Watermeier

Dr. Watermeier, a board-certified orthopedist, was deposed by the parties on January 25, 2006. (EX-38). He testified he initially examined Claimant on August 20, 2001, at the request of Carrier. (EX-38, p. 7). Claimant described his work accident and reported he continued to work for a few days before noting stiffness and pain in his lower back. He sought treatment from Drs. Desse and Trice. (EX-38, p. 8). He reported a 1996 incident and prior lower back and shoulder injuries. He did not report the February 2001 incident involving a state trooper. (EX-38, p. 9).

On physical exam, Claimant had mild tenderness to palpation, but no muscle spasm. Range of motion of the back was good. He had mild pain on straight leg raising, but was neurologically intact. There was no evidence of any neurological deficits. X-rays of the lower back were normal. Based on Claimant's reported symptoms, Dr. Watermeier recommended a lumbar MRI and EMG of the lower extremities to rule out "any physical objective evidence of back injury or neurological impairment." (EX-38, pp. 10-11). No specific diagnosis was rendered. (EX-19, pp. 34-35).

On October 1, 2001, Claimant returned with the same complaints. The physical exam was similar. The results of the MRI and EMG had been reported as normal. Based on Claimant's history and subjective complaints, Dr. Watermeier recommended more invasive

tests, a lumbar discogram and CAT scan. (EX-38, pp. 11-12). Claimant was diagnosed with lumbar disc syndrome and considered temporarily totally disabled. (EX-19, p. 25).

On January 23, 2002, Claimant returned for follow-up with the same complaints and physical exam results. Claimant was given an injection into his back for pain relief. Dr. Watermeier considered Claimant still temporarily totally disabled. (EX-38, p. 21). Claimant was diagnosed with SI Joint Dysfunction, lumbar disc syndrome and Spinal Enthesopathy. (EX-19, p. 24).

Dr. Watermeier completed a form prepared by Ms. Bond on November 21, 2001, wherein he responded that Claimant was able to return to regular duty and was at maximum medical improvement. (EX-20; EX-38, p. 14). The exact date when Dr. Watermeier completed the form is not discernable from the record evidence. He testified that the fax date of February 14, 2002, reflected on his response may have been the date of completion or receipt of the form, he did not know. (EX-38, pp. 14-16). On April 17, 2002, the Department of Labor sought clarification of his opinion.

On May 16, 2002, Dr. Watermeier explained that his response to Ms. Bond should have read that Claimant was "**unable** to return to work at this time." (EX-21). He further notes that Claimant "has no restrictions on functional limitations," is not a future surgical candidate, "date of MMI is 12 months post injury date," he has a 5% permanent partial disability, continuing medical treatment was not necessary and he can "now work full time." (EX-21, p. 21; EX-38, pp. 18-20). In clarification, he testified that in his opinion, as of May 16, 2002, Claimant was at maximum medical improvement and could then work full time. (EX-38, p. 19). His remarks regarding restrictions and limitations could be read "no restrictions on/or functional limitations." (EX-38, pp. 19-20).

On June 20, 2002, Claimant returned to Dr. Watermeier reporting a fall in April 2002 in which he broke his right wrist. Dr. Watermeier testified "his back has shown increased tenderness and muscle spasm now and a limited range of motion of his back." He attributed the increase back complaints to the intervening fall/accident. (EX-38, pp. 23-24; EX-19, p. 24).

On September 12, 2002, Claimant again reported low back pain to Dr. Watermeier who testified everything was "about the same as previous." Since the discogram had not been performed, Claimant was given medication and asked to return in three months. (EX-38, p. 24). Dr. Watermeier testified that there

was no objective evidence to support the subjective complaints of pain Claimant continued to express. (EX-38, pp. 24-25). He was continuing to treat Claimant as a course of pain management to control his subjective complaints of pain. (EX-38, p. 25).

On February 4, 2003, Dr. Watermeier limited Claimant to light work based on Claimant's subjective complaints. He diagnosed Claimant with Lumbago. (EX-19, p. 21). Dr. Watermeier testified there was no basis for the work limitations other than Claimant's continued subjective complaints of low back pain. (EX-38, p. 26). On May 5, 2003, Claimant's complaints, examination and treatment plan remained the same as did his work status as light work. (EX-19, p. 19).

On September 24, 2003, Claimant complained of neck pain for the first time. Dr. Watermeier testified he had no explanation for the neck pain complaints by Claimant. (EX-38, pp. 26-27). Claimant denied any new injuries or problems since his last evaluation. He was diagnosed with Lumbago and Cervicalgia. His work status remained light work. (EX-19, p. 16). On February 3, 2004 and May 4, 2004, Dr. Watermeier reported Claimant's complaints and status remained unchanged. Claimant was given injections for his lumbar pain. His work status/impairment changed to "Not Applicable." In February 2004, Claimant reported for the first time complaints of depression. In May 2004, Claimant denied any history of mental health problems, treatment or medication. (EX-19, pp. 11-14).

On August 3, 2004, Claimant's complaints, exam and treatment remained unchanging. His status was considered stable. He continued to deny any history of mental health problems, treatment or medication. Claimant was again given an injection for his lumbar pain. Dr. Watermeier requested a repeat MRI and EMG. (EX-19, pp. 9-10). He testified the repeat diagnostic tests were requested because of Claimant's continued subjective complaints of pain. (EX-38, p. 27). For the first time, Dr. Watermeier assigned work restrictions which were essentially light work restrictions. The restrictions were not assigned based on any new findings or studies, but because of Claimant's continued subjective complaints of back pain. He discussed the restrictions with Claimant and Claimant was aware that Dr. Watermeier believed he was capable of working within the restrictions. The restrictions included avoiding: repetitive stooping and bending, repetitive lifting over 10-20 pounds, prolonged sitting or standing in the same position for 45 minutes, without being able to move around and change position. (EX-38, pp. 27-28; EX-19, p. 9).

On August 2, 2005, Dr. Watermeier last examined Claimant. He testified that the January 26, 2005 MRI demonstrated a bulge of the L4-5 disc "that's possibly a component of his pain." Until the MRI result, which he received on August 15, 2005, he testified there were never any studies during the course of his treatment of Claimant that demonstrated any objective evidence to support Claimant's subjective complaints. He opined that the 2005 MRI results would be hard to correlate with Claimant's 2001 job injury. (EX-38, pp. 29-30). He agreed that with a normal MRI and EMG studies done in 2001, the results of the 2005 MRI, almost five years after Claimant's injury, would suggest that the bulge is part of the normal aging process and a degenerative problem not associated with the June 2001 accident/injury. (EX-38, pp. 31-32).

Dr. Watermeier also opined that Claimant reached a "point where he was stable" and was at "MMI at some point in time." Because the recommended discogram was not performed, "that had to be [his] opinion." (EX-38, p. 32). He approved the four current jobs identified by Ms. Bountovinas as suitable for Claimant. (EX-38, pp. 33-36).

He agreed that with the restrictions imposed on Claimant he would not expect him to return to work as a stevedore, which he considered to be heavy work. (EX-38, p. 39).

Dr. Daniel J. Gallagher

Dr. Gallagher, a board-certified orthopedist, examined Claimant for a second opinion on August 29, 2001, at the request of Employer/Carrier. (EX-22, p. 3; EX-39, pp. 6-7). He was deposed by the parties on March 7, 2006. (EX-39). At the initial exam, Claimant related his job accident/injury and a prior back and arm injury in 1996. (EX-39, p. 7). Claimant did not report his February 2001 incident involving a state trooper. (EX-39, p. 8).

On physical examination, Claimant had a decreased self-limiting range of motion of the lumbar spine, but no definite muscle spasm and was neurologically intact. Because Claimant had complaints of back pain and had been treated for two months by other physicians, Dr. Gallagher recommended a MRI of the lumbar spine. (EX-39, pp. 8, 20). He noted it was impossible to determine if Claimant could return to work because he had no description of his work duties or the results of the MRI. (EX-22, p. 4).

On October 22, 2001, Claimant returned to Dr. Gallagher for follow-up of the second opinion. Dr. Gallagher noted that the September 2001 MRI and EMG were normal as was his physical exam. Claimant had no objective orthopedic abnormalities and was

diagnosed with a lumbar sprain. Dr. Gallagher opined that Claimant should return to work and "see how he does," since he described work of a medium level. He also opined that Claimant had reached maximum medical improvement and did not need any further orthopedic testing or treatment. (EX-22, p. 7; EX-39, pp. 9-10).

On March 1, 2004, Claimant returned to Dr. Gallagher. He complained of continuing back pain radiating down his right leg and numbness to his toes. Claimant reported no treatment or testing since 2001 when he had last seen Dr. Gallagher. On physical exam, Dr. Gallagher determined Claimant had an essentially normal exam, but showed blatant signs of symptom exaggeration and malingering with positive Waddell signs which were documented. (EX-22, p. 7; EX-39, pp. 11-12, 13). Claimant related he was taking three Vicodin a day for pain, however, Dr. Gallagher opined there were no objective abnormalities to justify pain medication. (EX-39, p. 12). In March 2004, he remained of the opinion that Claimant had reached maximum medical improvement in October 2001, required no further medical treatment and could return to his former job. (EX-39, p. 18).

He disagreed with Dr. Watermeier's recommendation for a discogram because Claimant had normal diagnostic studies and normal exams. The only further testing which Dr. Gallagher would recommend was a MRI to determine if a disc had changed or to rule out deterioration over the three year period, but there was no strong indication to do a MRI since Claimant was not a surgical or steroid injections candidate. (EX-22, p. 7; EX-39, p. 13). Having reviewed the report of the January 2005 MRI, Dr. Gallagher testified that the MRI was normal with only a bulging of the L4-5 disc reported with no dehydration. Dr. Gallagher opined without dehydration "there is no degeneration, indicating there has been no trauma to the disc." He opined that dehydration is the first sign of a degenerative disc and that a disc begins to degenerate when it has been traumatized. Without dehydration, there has been no disc injury. (EX-39, p. 15). He further opined that Claimant's MRI was a better MRI than most 46 year olds would have. (EX-39, p. 16).

He agreed with Dr. Watermeier's November 2001 and May 2002 opinions that Claimant was at maximum medical improvement, could return to his former job and required no further treatment. (EX-39, pp. 16-17). Dr. Gallagher approved all four of the current jobs identified by Ms. Bountovinas as appropriate for Claimant and further opined he could find no medical reasons to restrict Claimant from any type of work activity. (EX-39, p. 19).

He testified that Dr. Watermeier's August 20, 2001 report which assigned temporary total disability to Claimant was an effort to give Claimant the benefit of the doubt since the physical exam was normal. (EX-39, p. 28). In further clarification, Dr. Gallagher testified that bulging is a normal physiologic function of the disc. To have a disc bulging out enough to cause pathology, it would have to be injured and undergo degeneration and dehydration due to an injury or a ruptured disc, and that Claimant "had neither one." (EX-39, p. 29). For a bulging disc to cause pain, Dr. Gallagher opined that other trauma to the disc such as annular tears or nucleus pulposis material going through the tears or the disc pinching on a nerve must be present. He added for a bulge to be significant enough to pinch on a nerve, it has to be degenerative with loss of water content. Claimant's MRI did not show any inflammation of the disc. (EX-39, p. 30).

Dr. Gallagher opined that maximum medical improvement from a lumbar sprain would occur before 12 months after injury. He further opined there is no indication that Dr. Watermeier's assignment of a five percent permanent impairment rating was in accordance with the AMA Guidelines, since there is no physical objective abnormality on his or Dr. Watermeier's exams. (EX-39, p. 31). He testified that without any objective abnormality on exam or testing, he would disagree with Dr. Watermeier's restricting Claimant to light work in September 2003 and assigning work restrictions in November 2004. (EX-39, pp. 32-33). Dr. Gallagher stated he would have released Claimant to perform his former job with Employer in October 2001 even if it was classified as heavy work. (EX-39, p. 34).

Dr. George Murphy

Dr. Murphy, a board-certified orthopedist, evaluated Claimant at the behest of the Department of Labor on October 25, 2004. He was deposed by the parties on August 24, 2005. (EX-37). He reviewed the September 6, 2001 MRI and the September 20, 2001 EMG, which he opined were unremarkable. (EX-17, p. 4). Claimant presented a history by describing his accident at work and the injury to his back. He did not mention a February 2001 incident involving a state trooper. (EX-37, p. 15).

Dr. Murphy treated Claimant in 1996 for a shoulder injury during which he complained of lower back pain. In 1996 a MRI of the back was done and considered normal. (EX-37, p. 17).

On physical examination, Claimant had good motion, no spasm, negative straight leg raising tests with only "some hamstring tightness." Neurologically, he was grossly intact. He opined that Claimant could have definitely returned to work in September 2001

when his testing turned up normal. Claimant would have initially been restricted from heavy activity. Since Claimant's symptoms persisted, he recommended a repeat MRI. (EX-17, pp. 4, 29-30). He disagreed with Dr. Watermeier's recommendation for a discogram since other testing was normal. In his view, the use of a discogram to find an abnormality was not valid testing. (EX-37, p. 23).

Based on his examination of Claimant, he opined there did not appear that "anything bad was going on with him." He would have allowed Claimant to work modified duties and treat him symptomatically if he had been treating Claimant. He would have ordered a repeat MRI six to 12 months after the injury as follow-up. (EX-37, pp. 24-25). There was nothing to preclude Claimant from returning to work, but he would have restricted him from the heaviest of work until a repeat MRI was done. (EX-37, pp. 25-26). He further opined Claimant could probably have performed medium work, but he would have wanted to know the specifics of the job. (EX-37, p. 26).

He disagreed with Dr. Gallagher's opinion that Claimant was at maximum medical improvement in October 2001, because it was too early in Claimant's treatment. He would prefer a six-month period during which Claimant could have been working with mild restrictions. (EX-37, p. 28). Dr. Murphy stated that it was appropriate for Dr. Watermeier as Claimant's treating physician to conclude that Claimant required no further medical treatment and could go back to regular work. (EX-37, p. 29).

Regarding the recommended repeat MRI conducted on January 31, 2005, he concluded it was unremarkable except for "some possible bulging at the L4-5 disc," which had normal hydration. Because of Claimant's persistent subjective complaints of radiation, and for completeness, he recommended a repeat EMG, which was never accomplished. (EX-17, p. 3). He opined that he could not relate the changes seen on the 2005 MRI to the June 2001 incident because of the passage of time. (EX-37, p. 33). They could be associated with degenerative changes or the 2001 accident. (EX-37, pp. 34, 40-41). The recommended EMG would be even more difficult to correlate. (EX-37, p. 36). There was nothing in the 2005 MRI which Dr. Murphy considered to preclude Claimant's working with slight restrictions. (EX-37, p. 40).

New Orleans Mental Health Center

On September 13, 2002, Dr. Roger Wortham evaluated Claimant for purposes of admission to the Mental Health Center. Claimant reported a "bad experience" in February 2001 when he was "roughed up and injured by a state trooper wherein he became terrified that

he would lose his life." He reported fear that policemen are coming to beat his wall down, if he hears a siren. He has recurrent intrusions of a voice repeating what he heard at the time of the incident. He is preoccupied that someone is out to harm him. Anxiety bouts are reported when he hears a siren or sees a policeman. Dr. Wortham noted no significant change in Claimant's ability to concentrate. (CX-16, p. 7).

Claimant reported "no history of health problems" in the section entitled "History of Substance Abuse," but acknowledged "two drunk in public charges." Claimant reported no history of "psychiatric contact." Claimant reported a 1995 work injury of his shoulder and "no history of serious injury otherwise." (CX-16, p. 8).

Dr. Wortham concluded that Claimant "sustained significant trauma wherein he described sustaining physical injury and believing that he was going to be killed." Since the incident with the state trooper, Claimant has experienced "hypervigilance, increased startle, intrusive recall and avoidance with associate somatic and psychic anxiety symptoms." Claimant was diagnosed with "Post-traumatic Stress Disorder [PTSD] Rule out Major Depressive Episode." (CX-16, p. 9). His prognosis was "fair," and he was prescribed medications. (CX-16, p. 10).

Claimant returned for follow-up visits with Dr. Worthman on October 9, 2002 and November 6, 2002 with no essential reported change in symptoms. (CX-16, p. 14). He also attended follow-up sessions on December 4, 2002 and January 29, 2003, about which Dr. Wortham recorded handwritten notes that are not discernible. (CX-16, p. 13).

Carlos Kronberger, Ph.D.

On August 2, 2004, Dr. Kronberger, a clinical psychologist, evaluated Claimant at the request of the Social Security Administration for an intellectual and mental status exam. He prepared a report dated August 2, 2004, and was deposed by the parties on July 17, 2006. (CX-19; EX-48). He testified that he was not provided a complete report by Dr. Wortham and no records of Claimant's physical problems. He opined that the lack of documentation affected his ultimate conclusions and opinions. (EX-48, pp. 10-12). He may have performed additional testing with a full report. (EX-48, pp. 13-14).

In seeking disability from Social Security, Claimant alleged disability from "leg and arm problems and mental impairment." (EX-48, p. 15). At the interview, when asked what problems were keeping him from working, he responded he had "back problems, I got

hurt in 2001. I fell on a ship." (CX-19, p. 5). Claimant mentioned the incident with the state trooper in February 2001 as the triggering factor of the primary cause of his complaints. (EX-48, pp. 31-32). He reported pain and nervousness about the assessment and was defensive and not comfortable. He reported feeling frightened by the police "that had been persecuting him." He reported having auditory hallucinations without any further details and visual hallucinations of people carrying on behind walls, with no other parameters in his presentation. (EX-48, pp. 20-24, 30).

Dr. Kronberger administered a WAIS-III which revealed Claimant had an IQ in the lowest percentile which was "way below expected levels." He found the results unreliable in view of Claimant's high school education, his inconsistent responses and giving less than his best effort. He gave Claimant the benefit of the doubt because of his complaints of pain during the interview. (EX-48, pp. 33-36). He concluded that Claimant "probably had an anxiety disorder not otherwise specified versus pain disorder with mixed psychological factors. (EX-48, p. 38). He could not determine whether Claimant was attempting to sabotage the assessment by acting out or had a negative attitude toward the assessment. (EX-48, pp. 40-41).

Dr. Kronberger did not diagnose PTSD because he had some doubts that he had gotten the whole story because "it did not quite add up to me." (EX-48, p. 42). He opined that Claimant met the criteria of PTSD when he was seen at the Mental Health Center in 2002 because he had a lot of anxiety symptoms, but whether he still had such symptoms three years later was "a whole other question." (EX-48, pp. 43-44). He would not disagree with Dr. Culver's opinion that Claimant did not have the "symptomology of PTSD" and was not convinced that Claimant was still having legitimate symptoms of PTSD. (EX-48, pp. 45-46).

He testified that his ratings in the "Medical Source Statement of Ability to Do Work-Related Activities" were no longer accurate based on his post-Hurricane Katrina experiences. He gave Claimant the benefit of the doubt about his physical complaints in assessing the ratings. (EX-48, pp. 52-53, 80-81). If Claimant's subjective complaints of pain were not supported by objective evidence, all of the checked ratings would be in the "slight" category. (EX-48, p. 55). He changed his "marked" ratings in Section 1 for ability to make judgments to "moderate," and for responding appropriately to work pressures or changes to "moderate" in Section 2. (EX-48, p. 73).

With the adjusted ratings, Dr. Kronberger testified that Claimant was capable of some type of gainful employment. (EX-48, pp. 59-61). Since Claimant returned to Employer and performed his job after the incident with the state trooper, Dr. Kronberger opined the incident was not so debilitating or limiting to prevent Claimant from doing his former job. (EX-48, p. 62). He further opined Claimant could have the same level of interaction with co-workers and supervisors as he did before the state trooper incident. (EX-48, p. 64). Dr. Kronberger opined that Claimant could perform the jobs of cashier, unarmed security guard and toll collector as identified by Employer/Carrier's vocational expert. (EX-48, p. 65).

Dr. Kronberger agreed that Claimant "could have some sort of personality disorder" and possible substance abuse problems because of his own characterization of abuse, conflicts with police, and interpersonal difficulties in his personal life. (EX-48, pp. 85-86, 91). He did not find any criteria for concluding that Claimant had any paranoid ideation. (EX-48, p. 87). He opined Claimant may have met the criteria for PTSD in 2001, but he was not aware that Claimant had returned to work with Employer which "changes things." (EX-48, pp. 93-94).

Dr. Rennie Culver

Dr. Culver, a board-certified psychiatrist, evaluated Claimant at the behest of Employer/Carrier on June 27, 2006, and rendered a report on July 6, 2006. (EX-46). He was deposed by the parties on July 14, 2006. (EX-47).

During the interview with Claimant, Dr. Culver performed a formal mental status examination. (EX-47, p. 10). Claimant reported constant back pain and had seen Drs. Desse, Watermeier and Gallagher. (EX-47, p. 14). He described his incident in February 2001 with a state trooper, but did not seek psychiatric treatment until 2002 and then did so on the advice of his attorney. (EX-47, pp. 14-16). Claimant also reported his work accident in 2001. Claimant only sought treatment in connection with the state trooper incident. (EX-47, p. 17). Dr. Culver questioned Claimant's motivation in seeking psychiatric treatment at that time. (EX-47, p. 16).

Dr. Culver testified that Claimant reported no benefit from the medications received from the Mental Health Center. Dr. Culver explained that Claimant either received benefit which he refused to acknowledge, or did not perceive himself as getting any benefit or was given medication for a problem he did not have. (EX-47, p. 22). He further concluded that there were "a lot of contradictions and inconsistencies" in Claimant's presentation. (EX-47, p. 24).

Based on his examination and history obtained from Claimant, Dr. Culver diagnosed Claimant with a psychotic disorder not otherwise specified. He could not be more precise because of the inconsistencies, contradictions and uncertainties in Claimant's presentation. (EX-47, p. 28). He also concluded that Claimant had a history of prescription drug dependency and alcohol abuse. Claimant had a personality disorder, not otherwise specified, because of the contradictions and inconsistencies. (EX-47, p. 29). Because Claimant's case arises in a medical/legal context, and he is receiving no response to the psychotropic medications, Dr. Culver opined the possibility of malingering has to be considered. There were enough unanswered questions that Dr. Culver thought psychological testing would be reasonable to recommend. (EX-47, p. 32).

He disagreed with the diagnosis of post-traumatic stress disorder (PTSD) since Claimant's clinical presentation was not convincing. Claimant professed love for his daughters and fiancée which is inconsistent with the essential diagnosis of PTSD of an inability to have loving feelings according to Dr. Culver. (EX-47, p. 35). Dr. Culver also questioned whether the "trauma" or experience with the Gretna police or state trooper was an extreme enough stressor, i. e., life threatening, to warrant a diagnosis of PTSD under the Diagnostic Manual. Claimant did not present with the symptom complex consistent with the diagnosis for PTSD. (EX-47, p. 36). Dr. Culver also opined that Claimant's nightmares of the incident in February 2001 with the state trooper did not comport with medical literature since only combat veterans have consistent nightmares of the stressor experiences. (EX-47, pp. 37-38). He further opined that no one dreams of only one thing, therefore he found Claimant's presentation incredible. (EX-47, p. 38). He further testified that even if he assumed the February incident was a life-threatening stressor, Claimant does not have the symptom complex consistent with a diagnosis of PTSD. (EX-47, pp. 146, 160).

Dr. Culver opined, to a reasonable medical degree of probability, that Claimant's psychological complaints were not caused or aggravated by his work accident/injury of June 25, 2001. Claimant's complaints relating to his alleged PTSD were all attributed to the February 2001 incident with police. (EX-47, p. 43).

Dr. Culver opined that Claimant has "paranoia to some degree" and "very intimate contact with others would be contraindicated" in a work setting. (EX-47, p. 46). The fact that Claimant returned to work for Employer after his February 2001 incident until his accident in June 2001 showed that he could function in a work

setting. (EX-47, pp. 48-49). Dr. Culver approved the cashier, toll collector and unarmed security officer jobs identified by Ms. Bountovinas as appropriate for Claimant. (EX-47, pp. 51-53).

On cross-examination, Dr. Culver acknowledged that Claimant has some mental issues. He reported that Claimant's presentation was more consistent with schizophrenia than PTSD, but did not diagnose Claimant with schizophrenia in the absence of consistent data. (EX-47, p. 104). He added that if Claimant has schizophrenia and "some symptoms of psychosis," it may impact his ability to function normally in society and retain a job. (EX-47, p. 105).

Dr. Culver explained that schizophrenia is a biological disorder of brain chemistry with two sets of manifestations neither of which is clear in Claimant's presentation. (EX-47, pp. 71-74). Therefore, Dr. Culver diagnosed psychosis not otherwise specified which is rarely caused by trauma. (EX-47, pp. 74-75). Although Claimant has an antisocial personality, it would not impair Claimant's ability to hold certain jobs and does not manifest itself from trauma. (EX-47, p. 79).

Dr. Culver testified that he was not sure what Claimant's underlying pathology is because the inconsistencies raise a lot of questions such as his report to Dr. Watermeier that he has no history of mental problems, treatment or medications when he was simultaneously going to the mental health center and receiving medications. (EX-47, pp. 111-112).

Dr. Culver added that if Claimant had a psychosis arising from the February 2001 police incident he would have experienced the condition immediately. (EX-47, pp. 158-159). He opined that if Claimant has a psychosis it would not have anything to do with the February 2001 incident because there has to be a temporal relationship with the onset and incident. (EX-47, p. 159).

The Vocational Evidence

Angeliki Bountovinas, a licensed vocational rehabilitation counselor, was tendered and accepted as an expert on behalf of Employer/Carrier. She was retained by Employer/Carrier on August 2, 2005, to perform a vocational assessment and labor market surveys. (Tr. 225).

She met and interviewed Claimant on August 22, 2005. (Tr. 210). She performed vocational testing on November 10, 2005, during which Claimant achieved overall results at a below average range in reading and math. She opined that Claimant possessed the required skills for most entry-level jobs which required either a

high school diploma or GED. (Tr. 211; EX-15, p. 21). She reviewed the medical and psychological reports of record including depositions of treating and consultative physicians and psychologists. (Tr. 212-213). She noted that Claimant had no restrictions initially, but Dr. Watermeier later placed Claimant at light work restrictions. (Tr. 215).

Ms. Bountovinas opined that based on Employer's job description of Claimant's former job, Claimant's responses during interview and the Dictionary of Occupational Titles, Claimant's former job was medium in physical demand. She noted however that Employer indicated lifting of 75 pounds may be required which is heavy work. (EX-15, p. 13).

On January 13, 2006, Ms. Bountovinas conducted a labor market survey and identified four current jobs: toll collector, parking garage cashier, and two security officer positions. (Tr. 216, 218; EX-15, pp. 26-28). The parking garage cashier job was with New South Parking at the airport which was considered a sedentary job and paid $7.00 per hour. An unarmed security officer position with Securitas was a light job paying $9.00 an hour. The toll collector job was with the Crescent City Connection and considered light in nature paying $9.21 per hour. Another unarmed security officer job with ACSS was available paying $9.00 an hour. (Tr. 218). She also performed a retroactive labor market survey by contacting five employers to determine the availability of other stevedore jobs. (Tr. 216; EX-15, pp. 25-26). Occupational alternatives or career areas for light jobs were also generally identified. (EX-15, pp. 24-25).

She testified that Dr. Watermeier reviewed the current positions available and approved the jobs for Claimant as within his restrictions. She forwarded the job information to Claimant who received the information on January 23, 2006. (Tr. 219). She followed up with the employers and could not confirm that Claimant had applied for any other available jobs. She testified that in the interview Claimant informed her he did not think he could return to any type of work. (Tr. 220).

Ms. Bountovinas also considered any psychiatric issues with her vocational evaluation. (Tr. 221). She noted that Dr. Culver and Dr. Kronberger opined that Claimant could continue to perform his former work for Employer since he did so for four months following the incident with the state trooper and could also perform the four current jobs available. (Tr. 222-223). She also verified that the toll collector position was appropriate for Claimant from a psychological perspective since the position had no interaction with the Gretna Police or the Crescent City Connection Police. (Tr. 223).

On cross-examination, Ms. Bountovinas confirmed she performed a retroactive labor market survey back to May and November 2001. (Tr. 225). She opined that after May 2002, Claimant could return to other stevedoring jobs in the labor market. She did not contact Employer to determine if Claimant could or would be offered a job. (Tr. 228). She affirmed that she performed a labor market survey in January 2006 based on the light restrictions assigned by Dr. Watermeier from his most recent report which included avoiding repetitive stooping or bending, repetitive lifting over ten to twenty pounds as well as prolonged sitting or standing in the same position for 45 minutes without being able to change position. The light duty restrictions were first noticed by Ms. Bountovinas as assigned on August 3, 2004. (Tr. 229). She agreed that if Dr. Watermeier found Claimant temporarily totally disabled in June 2002, he could not return to work. (Tr. 230).

Ms. Bountovinas opined, based on the opinions of Dr. Kronberger, that Claimant could function satisfactorily in interactions with the public and with supervisors as well as co-workers. She also opined that Claimant could function well in his former job as a stevedore and in the current jobs identified in her labor market survey. (EX-15, p. 48). She acknowledged that in Dr. Wortham's opinion it would be difficult for Claimant to function in most settings, but with assistance from a job coach through a supported employment program, he could be successful. (Tr. 231; EX-15, p. 48). She did not ask any employers of the current jobs whether they had a supported employment program. (Tr. 232).

Ms. Bountovinas did not provide potential employers with a description of Claimant's alleged mental disability since there were inconsistencies in the diagnoses and opinions of the mental health professionals of record. (Tr. 234). She opined that Claimant's mental status would not impact his ability to obtain or maintain the current jobs she identified. (Tr. 236). Both Drs. Culver and Kronberger approved the current jobs as suitable for Claimant as well as his ability to return to his former job with Employer. (Tr. 238).

The Contentions of the Parties

Claimant contends that he gave timely notice of his June 25, 2001 accident and injury on July 2, 2001. He avers the work injury is the cause of his continuing back pain and residual work limitations assigned by Dr. Watermeier. He contends he reached maximum medical improvement at the earliest on June 25, 2002, or when he was assigned light work status on February 4, 2003.

Having established total disability in accordance with Dr. Watermeier's opinion, Claimant asserts Employer/Carrier failed to establish suitable alternative employment which would comport with his "psychiatric disability." Claimant argues that his incident with a state trooper in February 2001 was not the subject of continuing medical treatment at the time of his work injury in June 2001 and did not affect his subsequent work performance with Employer. Regarding any intervening cause, Claimant contends that his May 2002 fall did not result in any reports of increased back pain to Dr. Watermeier and are irrelevant to his ongoing back problems.

Employer/Carrier concede that Claimant had a work accident on June 25, 2001, but had no ongoing disability after October 22, 2001, since he was released to unrestricted work by Dr. Gallagher. They argue Dr. Watermeier rendered equivocating opinions which should not be relied upon, but that even he released Claimant to full duty work by May 2002. They assert Claimant's testimony is incredible given his history of injuries before and after his work accident, his various altercations with police and the countervailing surveillance video obtained by their investigator.

Employer/Carrier further argue that since Claimant was released to full duty work, there was no need for Employer/Carrier to demonstrate the availability of suitable alternative employment. Nevertheless, they argue suitable alternative employment was established which jobs were approved by Drs. Gallagher and Watermeier. Moreover, the weight of the psychiatric evidence reveals that Claimant can perform work in the opinions of Drs. Culver and Kronberger who also approved the jobs identified as suitable alternative employment.

Lastly, Employer/Carrier contend that Claimant's fall in April 2002 resulting in a broken wrist was an intervening cause relieving them of liability since Claimant reported increased back complaints which Dr. Watermeier attributed to the fall. They argue Claimant's admission of a June 27, 2006, incident in which he was beaten by a policeman could also constitute an intervening cause for which no medical evidence was offered.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates

Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the reasoned opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id. It is claimant's burden to establish each element of his **prima facie** case by affirmative proof. Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

1. Claimant's Prima Facie Case

In the present matter, Claimant credibly testified that he slipped and fell on the deck of a ship at work and had soreness and "hurting" in his back afterwards. His supervisor was present when he slipped and fell, but did not report the accident. Claimant developed increased soreness over the following days even though he worked the remainder of his shift and the following Friday.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having demonstrated that he suffered a harm or pain on June 25, 2001, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

I further find that Claimant timely notified Employer of his accident and injury on July 2, 2001, when he telephoned Ms. Benoit. Employer also had constructive knowledge of Claimant's accident through supervisor Krummel on June 25, 2001.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

"Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.

Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer/Carrier concede that Claimant had a work accident on June 25, 2001. Supervisor Krummel's unsworn statement that Claimant reported no injury on June 25, 2001, confirms the fact of accident. Moreover, there is no medical evidence proffered supporting a conclusion that Claimant's back condition was neither caused by his working conditions nor the slip and fall reported by Claimant.

Accordingly, I find and conclude Employer/Carrier have not rebutted Claimant's **prima facie** case and that Claimant sustained an injury to his back as a result of his slip and fall at work on June 25, 2001.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical

improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant sought medical treatment for back pain from Dr. Desse on July 2, 2001, and was restricted from work until he was evaluated by an orthopedist. Dr. Trice, who evaluated Claimant on July 17, 2001, detected objective signs of injury and pain by palpating lumbar spasm and through positive straight leg raise tests. He diagnosed a lumbar sprain/strain and recommended physical therapy.

Dr. Watermeier, apparently the first orthopedist to examine Claimant after his work injury, evaluated him on August 20, 2001. No specific diagnosis was rendered, although a MRI and EMG were ordered to rule out any physical objective evidence of back injury. On October 1, 2001, the MRI and EMG results were reported as normal. Thus, there was no objective evidence of a back injury. Nevertheless, based on Claimant's continued subjective reports of pain, Dr. Watermeier diagnosed lumbar disc syndrome and recommended a lumbar discogram and CAT scan. He placed Claimant at temporary total disability.

Dr. Watermeier continued to evaluate Claimant every three months thereafter with the same complaints and same exam results. He admitted in deposition that there was no objective evidence or diagnostic testing results to support the subjective complaints of pain by Claimant. He assigned total disability, limited Claimant to light work and assigned work restrictions based solely on Claimant's subjective complaints.

Dr. Watermeier's conflicting responses to Carrier and Department of Labor regarding Claimant's ability to work and date of maximum medical improvement reflect vacillating opinions based purely on the subjective complaints of Claimant in which I place little credence. I find his opinions in this regard unreasoned and contrary to the credible opinions of Drs. Gallagher and Murphy. I find Dr. Watermeier initialed/signed Ms. Bond's form on or about February 14, 2002, and not November 21, 2001, since she pursued a response from him after sending the form on the latter date. His change of opinion in May 2002 regarding Claimant's inability to return to work is inexplicable. However, he nevertheless concluded that by May 16, 2002, Claimant had reached maximum medical improvement and could return to full time work without restrictions or limitations.

Contrary to Dr. Watermeier, Dr. Gallagher who examined Claimant on August 29, 2001, at the request of Employer/Carrier, found no muscle spasm, but self-limiting decreased range of motion of the lumbar spine. He also recommended a MRI. On October 22, 2001, Dr. Gallagher concluded Claimant's physical exam, MRI and EMG were normal and he had no objective orthopedic abnormalities. Claimant was considered at maximum medical improvement and could

return to his former job, which was considered medium work based on Claimant's description of his job. No further orthopedic testing or treatment was deemed necessary. When Dr. Gallagher examined Claimant in March 2004, he determined Claimant had a normal exam, but exhibited blatant signs of symptom exaggeration and malingering. Based on a lack of objective findings, Dr. Gallagher also opined he would have returned Claimant to heavy work or any work activities.

Dr. Murphy, who performed an independent medical exam at the request of Department of Labor on October 25, 2004, reached results consistent with Dr. Gallagher's findings. He opined the MRI was unremarkable and Claimant could have definitely returned to work in September 2001 when his testing results were normal. He would have initially restricted Claimant from the heaviest work until a repeat MRI was performed six to 12 months after the injury. He disagreed with Dr. Gallagher that Claimant had reached maximum medical improvement in October 2001 because it was too soon after the injury, preferring a six-month period to recover. He rendered no specific opinion when Claimant reached maximum medical improvement. He opined the 2005 MRI was also unremarkable except for a possible bulging disc which could not be correlated to the 2001 work injury. Although he recommended a repeat EMG, he clarified that the EMG results would be more difficult to correlate with the 2001 work injury than the repeat MRI.

Contrary to Dr. Watermeier, Drs. Gallagher and Murphy disagreed with the need for a recommended discogram in view of normal testing results and normal physical examination. Here, all three orthopedists agree that the repeat MRI would be difficult to correlate to Claimant's 2001 work injury. I find Dr. Gallagher's explanation and opinion regarding the "bulging disc" to be most persuasive. Since the preponderance of the evidence of record does not support a finding that the "bulging disc" shown in the 2005 MRI is a result of the 2001 work injury, which is Claimant's burden of persuasion, I find, consistent with even Dr. Watermeier's opinion, the change is a result of the normal aging process and a degenerative problem not associated with the 2001 work injury.

I am not impressed with the equivocating reasoning of Dr. Watermeier whose opinions are not based on objective evidence but the subjective reports of Claimant. There is no objective record evidence of an injury beyond a lumbar sprain/strain which should have resolved according to the opinions of Drs. Gallagher and Murphy. There is no objective evidence supporting a light work limitation, "temporary total disability" status or any of the work

restrictions assigned to Claimant by Dr. Watermeier. I find the opinions of Dr. Murphy more reasoned than those of Drs. Gallagher or Watermeier. Dr. Murphy would have limited Claimant initially from heavy work, but concluded he could have returned to his former job within a six to 12 month period.

I find that the record as a whole supports a conclusion that Claimant reached maximum medical improvement on May 16, 2002, and was then capable of returning to his former work full time. The date of maximum medical improvement comports with Dr. Watermeier's opinion as well as Dr. Murphy's view that six to 12 months after injury was appropriate for maximum medical improvement.

I was not favorably impressed with Claimant's professed psychological impairment. His alleged PTSD symptoms were first voiced at a September 13, 2002 mental health evaluation, over one and one-half years after the alleged incident which gave rise to his condition. Claimant never attributed his work accident/injury as the cause of his alleged psychological condition. Dr. Watermeier's treatment notes reveal contradictory self-reports regarding the state of Claimant's purported mental health. Drs. Kronberger and Culver opined that Claimant did not have symptoms of PTSD and was not psychologically restricted from performing gainful employment, including his former job which he performed after the alleged triggering incident of February 2001.

Accordingly, I find and conclude that Claimant was temporarily totally disabled from June 25, 2001, excluding any days worked, through May 16, 2002, when he reached maximum medical improvement. I further find and conclude that on May 16, 2002, Claimant was able to return to his former job duties with Employer and was no longer disabled from his work injury of June 25, 2001.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

An employer may establish suitable alternative employment by offering claimant modified employment that comports with his work restrictions within his current work place. Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986); Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685 (5th Cir. 1996).

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by

demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

Since I have found that Claimant was no longer disabled from his work accident/injury on May 16, 2002, Employer had no obligation to demonstrate suitable alternative employment. Furthermore, the record indicates Claimant's former job was available to him for which he made no application or inquiry.

Claimant's argument that his psychological "disability" precluded his return to work and was not considered by Employer/Carrier's vocational expert in her search for alternative jobs is also rejected. Claimant performed his former job from February 2001 until June 25, 2001, when he was injured, purportedly with his alleged symptoms which Dr. Culver concluded were not debilitating or limiting. Claimant did not complain about his alleged psychological symptoms to any mental health provider until September 2002, well after reaching maximum medical improvement for his work injury. Moreover, only disability attributable to the work injury, or factors related to conditions pre-dating the injury, are relevant to a consideration of suitable alternative employment. See Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981). I find the alleged psychological condition arguably had an onset in September 2002, when Claimant first sought treatment therefor, and was irrelevant as a factor in the consideration of suitable alternative employment.

E. Intervening Cause

Employer/Carrier argue Claimant's April 2002 wrist injury/accident constitutes an intervening cause which terminates their liability for his work-related condition.

If there has been a **subsequent non-work-related injury or aggravation**, the employer/carrier are liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT)(5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the **subsequent injury or aggravation is not a natural or unavoidable result of the work injury**, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer/carrier are relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981).

Where there is no evidence of record which apportions the disability between the two injuries it is appropriate to hold employer/carrier liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 15 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

The U.S. Fifth Circuit Court of Appeals has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n., which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the Court in Mississippi Coast Marine v. Bosarge, held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the Court held that "[a] subsequent injury is compensable if it is the direct and natural result of a

compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause."

In the present matter, Claimant's April 2002 wrist injury/ accident was arguably the result of negligence, which caused the accident. There is neither an allegation nor any evidence that Claimant's work-related injury caused the accident. Accordingly, I find and conclude that Claimant's subsequent April 2002 accident was not the natural or unavoidable result of Claimant's work-related injury. Thus, the injury may constitute an intervening cause of a subsequent injury occurring outside of work to relieve Employer/Carrier of liability for the subsequent injuries.

The medical reports in evidence reflecting treatment after the April 2002 accident indicate that Claimant's back pain increased as a result of his accident according to Dr. Watermeier. However, the medical evidence of record does not establish to what extent, if any, the possible intervening cause overpowered or nullified Claimant's original back condition since he reached maximum medical improvement from his job injury on May 16, 2002. An apportionment of Claimant's disability cannot be determined based on an absence of medical opinions. Accordingly, I find and conclude the medical evidence of record does not support an apportionment of Claimant's disability among his occupational injury and his subsequent April 2002 injury/accident.

In light of the foregoing, I find and conclude there is no reasonable basis on which to apportion disability among Claimant's injuries. See Plappert, supra, at 110. Therefore, Employer/Carrier continued to be liable for Claimant's work-related back injury/disability.

F. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be

both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

Employer/Carrier argue that the record does not support the necessity for continued medical treatment for Claimant's back injury. The only additional diagnostic testing recommended by any physician was the discogram and CAT scan suggested by Dr. Watermeier. Drs. Gallagher and Murphy disagreed with the recommendation because of Claimant's normal testing and physical exam. Dr. Watermeier treated Claimant's subjective complaints with medications and as a course of pain management. Drs. Gallagher and Murphy opined that there was no further necessity for medical treatment or testing when Claimant reached maximum medical improvement. Dr. Watermeier agreed with such a conclusion in his clarification response to Department of Labor on May 16, 2002, when he opined that "continuing medical treatment was not necessary."

Accordingly, based on the treating and consultative physicians of record, I find and conclude that upon reaching maximum medical improvement on May 16, 2002, Claimant no longer required medical treatment or management for his June 25, 2001 work injury.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer/Carrier paid temporary total disability compensation to Claimant from July 2, 2001 through October 22, 2001. On November 13, 2001, Employer/Carrier filed a notice of controversion.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[6] Thus, Employer was liable for Claimant's total disability compensation payment on July 9, 2001. Since Employer controverted Claimant's right to continuing compensation on October 22, 2001, Employer had an additional fourteen days, or a total of 28 days, within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by November 19, 2001, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on November 13, 2001, and is not liable for Section 14(e) penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds,

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[6] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[7] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

[7] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 8, 2005**, the date this matter was referred from the District Director.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from June 25, 2001 to May 16, 2002, excluding any days worked, based on Claimant's average weekly wage of $402.99, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all accrued reasonable, appropriate and necessary medical expenses arising from Claimant's June 25, 2001, work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

4. Employer/Carrier shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 14th day of September, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge